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S. HRG. 98-834

# NOMINATIONS OF BRUCE E. THOMPSON AND JOHN F. SCRUGGS

## HEARING

BEFORE THE

## COMMITTEE ON FINANCE
## UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

NOMINATIONS OF

BRUCE E. THOMPSON, JR., TO BE DEPUTY UNDER SECRETARY OF THE TREASURY FOR LEGISLATIVE AFFAIRS

JOHN F. SCRUGGS TO BE ASSISTANT SECRETARY OF HEALTH AND HUMAN SERVICES FOR LEGISLATION

APRIL 5, 1984

Printed for the use of the Committee on Finance

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# NOMINATIONS OF BRUCE E. THOMPSON AND JOHN F. SCRUGGS

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**THURSDAY, APRIL 5, 1984**

U.S. SENATE,
COMMITTEE ON FINANCE,
*Washington, DC.*

The committee met, pursuant to notice, at 1:40 p.m., in room SD-215, Dirksen Senate Office Building, Hon. William V. Roth, Jr., presiding.

Present: Senator Roth.

[The press release announcing the hearing, the statements of Senators Dole and Warner, follow:]

[Press Release No. 84-134]

FINANCE COMMITTEE SETS HEARING ON NOMINATIONS

Senator Robert J. Dole (R., Kans.), Chairman of the Committee on Finance, announced today that the Committee would conduct a hearing on Thursday, April 5, 1984, on two nominations by President Reagan that have been referred to the Committee.

The hearing will commence at 1:30 p.m. in room SD-215 of the Dirksen Senate Office Building.

The nominees are:

1. Mr. Bruce E. Thompson, Jr., of Chevy Chase, Maryland, has been nominated to be Deputy Under Secretary of the Treasury for Legislative Affairs. Currently, Mr. Thompson is serving as an Assistant Secretary of the Treasury for Business and Consumer Affairs, and from 1981 to 1983, he served as Deputy Assistant Secretary for Legislative Affairs. From 1974 to 1981 Mr. Thompson was Legislative Assistant to Senator William V. Roth, Jr., and prior to that position he was a senior policy analyst for the Government Research Corporation. Mr. Thompson possesses a B.S.B.A. in Finance from Georgetown University.

2. Mr. John F. Scruggs of Alexandria, Virginia, has been nominated to be Assistant Secretary of Health and Human Services for Legislation. Since 1982 Mr. Scruggs has served as Special Assistant to the President for Legislative Affairs. Prior to 1982, he served as Floor Assistant to the Republican Whip of the House of Representatives. From 1978 to 1981 Mr. Scruggs worked as a staff assistant and later as Minority Counsel to the Committee on Rules of the House of Representatives. He received his B.A. from Biola College in La Mirada, California.

STATEMENT OF SENATOR DOLE

Senator Roth, I appreciate your chairing this hearing today on the President's nominee to be Assistant Secretary of the Treasury for Legislative Affairs. I welcome your former assistant, Bruce E. Thompson, Jr. As a principal point of communication with the administration on our broad legislative mandate, his new position is of utmost concern to this committee. I am pleased that the President has chosen an experienced, qualified person to represent him in this position.

Bruce worked as legislative assistant to Senator Roth for tax and budget matters from 1974-1981. The committee since then has worked closely with Bruce in his subsequent jobs as Deputy Assistant Secretary of the Treasury for Legislative Affairs and, since last summer, Assistant Secretary for Business and Consumer Affairs.

Bruce played a major role in our formulation of the Economic Recovery Tax Act in 1981 and the Tax Equity and Fiscal Responsibility Act in 1982. We will be pleased to have him again working with us this year as we try to enact the committee's deficit reduction package.

For the record, let me say that we have reviewed his financial disclosure forms, and the materials he filed with the Office of Government Ethics. Also, we have received a letter from the Director of Government Ethics approving the nominee's compliance with the Ethics in Government Act. I am satisfied that there are no problems in this area.

---

STATEMENT OF SENATOR JOHN W. WARNER

Mr. Chairman and members of the committee, today, I am pleased to present Mr. John F. Scruggs as the President's nominee to be Assistant Secretary for Legislation of the Department of Health and Human Services.

A native of California and an honor graduate of Biola College, Mr. Scruggs and his wife, Nancy have resided in Virginia for the past four years. Mr. Scruggs possesses a complete knowledge of the legislative and executive branches that embrace a unique quality well suited for the position to which he has been nominated.

For the past two years, Mr. Scruggs has served as (one of the youngest) Special Assistants to the President for Legislative Affairs a position which requires complete knowledge of the interactions between the legislative and executive branch. Mr. Scruggs has played a key role in many of the Reagan Administration's successful legislative initiatives. Previously, he served as Floor Assistant to House Republican Whip Trent Lott, where he aided members in parliamentary procedure, legislative strategy and drafting of legislation. His career in government began in 1978 with his three year tenure on the House Rules Committee, beginning as a Staff Assistant and ending as Subcommittee Counsel.

I believe the members of the Committee will agree that Mr. Scruggs is uniquely qualified and I therefore, welcome his nomination and look forward to working with him on matters of mutual concern to the Congress and the Administration.

Senator ROTH. I am very pleased to preside today at the confirmation hearing of two individuals, Bruce Thompson and John Scruggs.

I want to say to you, Mr. Thompson, I have a long list of questions I have worked on all day, such as what did you do in the several years you worked for me. [Laughter.]

Seriously, the most important question I have is regarding the tax law that was enacted back in 1981. If you are confirmed, I would like to know how you would name this particular piece of legislation.

[The letter from the Office of Government Ethics and the résumé of Bruce E. Thompson, Jr., follow:]

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

MAR 27 1984

Honorable Robert Dole
Chairman, Committee on Finance
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Bruce E. Thompson, Jr., who has been nominated by President Reagan for the position of Assistant Secretary of the Treasury (Legislative Affairs).

We have reviewed the report and have also obtained advice from the Department of the Treasury concerning any possible conflict in light of the Department's functions and the nominee's proposed duties. Based thereon, we believe that Mr. Thompson is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

David H. Martin
Director

Enclosure

BRUCE E. THOMPSON, JR.

OFFICE:
U.S. Treasury Department
Washington, D.C. 20220
566-2037

HOME:
3511 Shepherd St.
Chevy Chase, MD 20815
652-1641

EMPLOYMENT HISTORY

June 1983 to Present:

Assistant Secretary for Business and Consumer Affairs
U.S. Treasury Department

March 1981 to June 1983:

Deputy Assistant Secretary for Legislative Affairs
U.S. Treasury Department

March 1974 to March 1981:

Legislative Assistant to U.S. Senator William V. Roth, Jr.

June 1971 to March 1974:

Senior Policy Analyst, Government Research Corporation, publisher of National Journal

EDUCATION

Georgetown University, BSBA, Finance, 1971
George Washington University, Graduate study in Taxes and Finance

PERSONAL

Date of Birth: June 5, 1949, Cleveland, Ohio

Married, two children

**STATEMENT OF BRUCE E. THOMPSON, JR., NOMINATED TO BE DEPUTY UNDER SECRETARY OF THE TREASURY FOR LEGISLATIVE AFFAIRS**

Mr. THOMPSON. Senator, there has never been any doubt in my mind that the bill has always been the Roth-Kemp bill.

Senator ROTH. He is passing with flying colors very well so far. I have also been asked by a number of people that, if you are confirmed—and I underline the word "if"—do you promise not to smoke black cigars in the Capitol?

Mr. THOMPSON. Yes; I do promise that.

Senator ROTH. Have you discussed possible conflicts of interest with our committee's chief counsel?

Mr. THOMPSON. Yes, sir, I have.

Senator ROTH. And there is nothing in your background that you feel in any way would prevent you from discharging the responsibilities of your office?

Mr. THOMPSON. No, sir, there are none.

Senator ROTH. Is there any reason which you know that would preclude you from serving in the office to which you have been nominated?

Mr. THOMPSON. No, sir, there are none.

Senator ROTH. As usual, the staff forgot to bring me the rest of the questions, so I will waive the opportunity to ask a number of questions I have long wanted to propound for you, but I am delighted to see you succeed—another able young man—and I know you are going to do well. Congratulations.

Mr. THOMPSON. Thank you, Senator.

Senator ROTH. I also have a statement by Senator Dole. It says a number of very nice things about you, but I will resist the temptation to read them. [Laughter.]

Thank you very much.

Mr. THOMPSON. Thanks very much, Senator.

Senator ROTH. Good luck to you.

Mr. THOMPSON. Thank you.

Senator ROTH. At this time, it is my pleasure to call forward John Scruggs. John, I am delighted to welcome you here today, as well as your wife. It is very nice to have both of you.

[The letter from the Office of Government Ethics and the résumé of John F. Scruggs follow:]

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United States of America
**Office of Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

MAR 27 1984

Honorable Robert Dole
Chairman, Committee on Finance
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by John F. Scruggs, who has been nominated by President Reagan for the position of Assistant Secretary for Legislation of the Department of Health and Human Services.

We have reviewed the report and have also obtained advice from the Department of Health and Human Services concerning any possible conflict in light of the Department's functions and the nominee's proposed duties. Based thereon, we believe that Mr. Scruggs is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

David H. Martin
Director

Enclosure

JOHN F. SCRUGGS

**Home**

3407 Old Dominion Blvd.
Alexandria, Va. 22305
(703) 549-5624

**Office**

Dept. of Health & Human Services
200 Independence Ave, S. W.
Room 416-G
Washington, D. C. 20201
(202) 245-7627

**WORK EXPERIENCE:**

Mar. 1984 — Assistant Secretary-designate for Legislation, DHHS. Responsible for assisting the Secretary in developing and implementing legislative programs and is the department's liaision official with the Congress. Responsible for the day-to-day operations of the Office of Legislation, which includes divisions responsible for health, human services, appropriations and congressional liaision.

1982 - 1984 — Special Assistant to the President for Legislative Affairs, The White House. Advocate for the President's program on Capitol Hill. Responsible for writing schedule proposals, briefing papers, recommended phone calls and other memos for use by the President. Advised the senior staff on legislative strategy and presented the views and concerns of Members to White House decision makers.

1981 - 1982 — Appointed by Republican Whip Trent Lott to Floor Assistant to the Republican Whip, United States House of Representatives. Responsibilities included advising Republican Members on parliamentary procedure, legislative strategy, and the substance of legislation.

1980 - 1981 — Appointed by the Honorable Robert E. Bauman to Minority Counsel, Subcommittee on the Rules of the House, United States House of Representatives. Responsibilities included preparing an analysis of the various legislation considered by the subcommittee regarding such matters as changes in the rules of the House and government reorganization. Responsibilities also included arranging field hearings, the briefing of witnesses, and the preparation of questions.

1978 - 1980 — Appointed by the Honorable Robert E. Bauman to Staff Assistant, Committee on Rules, United States House of Representatives. Responsibilities included preparing an anaylsis of all legislation considered by the Rules Committee, advising the Congressman on parliamentary maneuvers and strategy, drafting floor statements, and amendments.

1978 — Appointed by the Honorable Del Clawsen to Staff Assistant, Committee on Rules, United States House of Representatives. Although this position was a six-month internship, responsibilities were essentially the same as those listed above.

EDUCATION:

Legal — The American University, Washington College of Law, Washington, D. C. Courses completed include: constitutional law, federal income tax, international law. Currently taking leave of absence.

Undergraduate — Biola College, La Mirada, California. B. A. History, 1978 Cum Laude - Thesis Topic: "Educational and Occupational Upward Mobility of Blacks Since the 1964-65 Civil Rights Acts"

HONORS/AWARDS: Who's Who in America 1984

Outstanding Young Men of America, 1981

Academic and Social Register of Prominent College Students, 1977

California State Scholorship 1975-1978

Biola College Meritorious Service Scholarship, 1976

INTERESTS: Photography, aquariums, backpacking-camping.

PERSONAL: Born: January 14, 1955 to Floyd and Marilyn Scruggs. Attended grade school and high school in Salinas, California. Marital status: Married. Health: Excellent.

REFERENCES AVAILABLE UPON REQUEST

**STATEMENT OF JOHN F. SCRUGGS, NOMINATED TO BE ASSISTANT SECRETARY OF HEALTH AND HUMAN SERVICES FOR LEGISLATION**

Mr. SCRUGGS. Thank you, Senator.

Senator ROTH. I know it is an important event in your career. Would you please tell the committee the job for which you have been nominated, and a little about your background?

Mr. SCRUGGS. Yes, sir, the job is Assistant Secretary for Legislation at HHS. I come from White House Legislative Affairs, where I worked for 2 years on the House side. Prior to that, I was Trent Lott's floor assistant in the House for 1 year. Prior to that, I worked for 2 years on the House Rules Committee.

Senator ROTH. What do you think is the most important function of an Assistant Secretary for Legislative Affairs?

Mr. SCRUGGS. I think the most important function is to convey the Secretary's position and the President's position and view on issues that impact on the Department and, conversely, to present to policymakers at HHS your positions and your interests on those issues.

Senator ROTH. It is about the time of year that the Social Security Board of Trustees report is due. Do you expect that we will receive that report in the near future? I assume the trust funds are operating at about the same shape as projected last spring when we approved the 1983 social security amendments.

Mr. SCRUGGS. Yes, sir. Senator, I expect you will receive the report this afternoon or tonight, in fact, and the social security amendments passed in 1983 are having the desired effect. There is a surplus, although it is a somewhat narrow margin of safety. I think we can have some confidence that we will be able to pay benefits into the next century, even under somewhat pessimistic economic assumptions.

Senator ROTH. Have you discussed any possible conflicts of interest in your proposed job with our counsel?

Mr. SCRUGGS. Yes, sir.

Senator ROTH. Do you see any problems of any kind?

Mr. SCRUGGS. No, Senator. I don't.

Senator ROTH. Do you know of any reason that would preclude you from serving in the office to which you have been nominated?

Mr. SCRUGGS. No, sir. I don't.

Senator ROTH. Would you be willing to come forward before any appropriate committee to testify?

Mr. SCRUGGS. Yes, sir, I would. Absolutely.

Senator ROTH. I have a list of questions prepared by Senator Baucus. I would ask that you—within a week—supply the answers to those questions.

Mr. SCRUGGS. I will do so.

Senator ROTH. Again, I want to congratulate you. It is nice to have you.

Mr. SCRUGGS. Thank you very much. Senator, may I submit a statement for the record.

Senator ROTH. Yes. As a matter of fact, would you like to make a statement?

Mr. SCRUGGS. No, sir. I will just submit it for the record.

Senator ROTH. Would you like to make a statement, Mrs. Scruggs?

Mrs. SCRUGGS. No, sir.

Senator ROTH. I am relieved in both cases. [Laughter.]

Thank you, Mr. Scruggs.

Mr. SCRUGGS. Thank you. Senator.

[Mr. Scruggs' statement and answers to questions from Senators Dole and Baucus follow:]

STATEMENT OF JOHN F. SCRUGGS

ASSISTANT SECRETARY-DESIGNATE

FOR LEGISLATION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

APRIL 5, 1984

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

IT IS AN HONOR TO APPEAR BEFORE YOU TODAY.

THIS IS AN IMPORTANT AND EXCITING PERIOD IN THE HISTORY OF OUR COUNTRY. THE PRESIDENT HAS SET IN PLACE AN ECONOMIC RECOVERY PROGRAM WHICH IS HAVING BOTH PROFOUND AND POSITIVE EFFECTS ON ALL SEGMENTS OF OUR POPULATION.

I AM CONFIDENT THAT MY PREVIOUS GOVERNMENT SERVICE WILL ENABLE ME TO CAPABLY SERVE THE PRESIDENT, SECRETARY HECKLER AND THE CONGRESS AS WE WORK TOGETHER TOWARD OUR GOAL OF SUSTAINED ECONOMIC GROWTH. I LOOK FORWARD TO THE CHALLENGE THIS OFFICE HOLDS FORTH.

AS CONGRESS BEGINS THE DEBATE ON THE BUDGET, I NEED NOT REMIND THIS DISTINGUISHED COMMITTEE ABOUT THE IMPORTANCE OF OUR ROLE AT THE DEPARTMENT OF HEALTH AND HUMAN SERVICES -- AN AGENCY WHICH CONSUMES OVER A THIRD OF THE ENTIRE FEDERAL BUDGET.

THE CONTINUING BUDGETARY DEBATE, ~~FOCUSES~~ makes us focus ON THE DIFFICULT TASK WHICH FACES SECRETARY HECKLER AND THOSE WHO ARE PRIVILEGED TO BE PART OF HER TEAM AT HHS: THE NEED FOR PRESERVING ESSENTIAL SERVICES TO THE 50 MILLION AMERICANS THE DEPARTMENT SERVES, WHILE MAINTAINING OUR FISCAL COMMITMENT TO ALL THE 235 MILLION AMERICANS THE FEDERAL GOVERNMENT SERVES.

THIS TASK IS NOT UNFAMILIAR TO MEMBERS OF THE FINANCE COMMITTEE, WHO HAVE WORKED MANY LONG AND HARD HOURS TO CRAFT A DEFICIT REDUCTION PACKAGE WHICH MEETS THOSE GOALS.

MR. CHAIRMAN, IF MY NOMINATION AS ASSISTANT SECRETARY FOR LEGISLATION IS APPROVED BY THE COMMITTEE AND SUBSEQUENTLY BY THE SENATE, YOU MAY BE ASSURED THAT I WILL STRIVE TO FULFILL THE RESPONSIBILITIES OF THIS DEMANDING POSITION.

I PLEDGE TO WORK WITH YOU AS A RESPONSIVE AND RESPONSIBLE PUBLIC SERVANT; TO GIVE YOU A STRAIGHT-FORWARD AND ACCURATE REPRESENTATION OF THE ADMINISTRATION'S VIEWPOINT, AND TO MAKE CERTAIN THAT YOUR VIEWS, AND THOSE OF YOUR CONSTITUENTS, ARE CONVEYED TO MY COLLEAGUES AT THE DEPARTMENT AND INCORPORATED IN OUR DECISION-MAKING PROCESS.

THANK YOU FOR YOUR CONSIDERATION.

Written Questions for Mr. John Scruggs

by

Senator Max Baucus

1. What is the Departmental policy regarding the attendance of Departmental personnel at interviews conducted by Senate or House of Representative staff members?

2. Do you concur that cooperation with the Congress should never involve Department sanction of the option for an employee to refuse to be interviewed in the course of such an investigation? If you do not agree in any way, please specify your disagreements.

3. Do you understand that the Rules of the House allow personal counsel for a Departmental employee being interviewed and that that counsel should not act as Department counsel? Will you assure that this rule is given full effect?

4. Are you familiar with the protections in the U.S. Code applicable to communications between employees of the Executive branch and Congress?

5. Will Deparment employees be allowed to bring material to interviews with Congressional staff members, if requested to do so?

6. To the extent that the Department's policy concerning employee interviews with Congressional staff members is informal, what steps will you take to reduce the complete policy to writing?

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7. What steps will you take to inform employees of the formal Departmental policy concerning interviews with Congressional staff members?

8. On March 1, 1984, the Acting Secretary for Legislation wrote to Chairman Dingell of the Committee on Energy and Commerce in the House of Representatives in response to his letter of Februr y 23, 1984, announcing an investigation by his Subcom..ittee to reduce infant mortality. In her letter, Teresa Hawkes, Assistant Secretary for Legislation, stated what she believed to be Departmental policy about provision of documents to Oversight Committees of Congress. She stated in part that the Department wanted advance notice of documents subject to the inquiry "...in order that we can arrange to have those files available and to determine that they contain no information (such as trade secrets, patient specific material or grand jury information) to which access would be restricted by law."

With regard to determination by the agency that documents contain no information to which access would be restricted by law, Chairman Dingell noted that in his letter to the Secretary that he would welcome identification of materials such as trade secrets, patient specific material and the like by HHS so that the Subcommittee would be on notice to protect such items from inadvertent release, but noted that such identification should, in no way, delay their being made available to his Subcommittee.

Do you concur that the provisions of such documents to oversight and investigative bodies of the Congress should be accomplished expeditiously and that such materials as referred to in the letters of March 1 by Hawkes and March 5 by Chairman Dingell are not to be restricted from Congress but from the public?

If there is any aspect of the Chairman's postion on provision of such documents with wich you disagree, please enumerate them.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

April 9, 1984

1984 APR 11 AM 9:25

The Honorable Robert Dole
Chairman
Committee on Finance
United States Senate
Washington, D.C. 20510

Dear Senator Dole:

Enclosed is the response of John F. Scruggs to the questions Senator Baucus submitted for the record of the April 5 hearing on Mr. Scruggs' nomination as Assistant Secretary for Legislation at the Department of Health and Human Services.

We would appreciate it if this response could be incorporated in the hearing record.

Thank you for your assistance.

Sincerely,

Patricia Knight

Patricia Knight
Special Assistant to
the Assistant Secretary

Enclosure

cc: Senator Baucus

RESPONSE FOR THE RECORD TO QUESTIONS SUBMITTED BY SENATOR MAX BAUCUS

1. When Departmental personnel are asked to appear before oversight or investigative committees of the Congress, they are informed of their rights and duties pursuant to that request. The Department does not have the power to compel its employees to appear before a committee, nor does it have the right to prevent such an appearance. In my opinion, employees should be encouraged to appear and to fully cooperate with Congress in the pursuit of its oversight and investigative functions.

2. My personal view is that cooperation with the Congress is essential and, as stated above, that employees should be encouraged to facilitate the oversight and investigative functions of Senate and House committees.

3. As you know, the Rules of the House state in Rule XI cl. 2(k)(3) that "witnesses at investigative hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights." I understand and fully concur with this Rule.

4. Yes, 18 USC §1505, 5 USC §2301(a) (9) et seq. and 5 USC §7211.

5. Yes, if requested to bring specific documents. If not, the interview should be used to refine, define, and clarify the specificity of requests for documents.

6. In my opinion, the question of reducing to writing the Department's policy concerning employee interviews should be explored. When all relevant information has been obtained and when we have solicited comments from all staff division and operating division heads, a final decision should be made on the need to reduce the policy to writing.

7. Employees asked to appear for an interview with Congressional staff members will be informed of their rights and duties pursuant to that request. I will encourage employees to appear and to cooperate fully.

8. I believe that the provision of such documents to oversight and investigative bodies of the Congress should be accomplished expeditiously. However, such documents should only be provided consistent with the provisions of applicable law.

MICHAEL D. BOPP
COUNSEL

M. ELIZABETH CULBRETH
DEPUTY COUNSEL

MORGAN J. FRANKEL
ASSISTANT COUNSEL

United States Senate
OFFICE OF SENATE LEGAL COUNSEL
WASHINGTON, D.C. 20510

May 10, 1984

The Honorable Robert Dole
Chairman, Committee on Finance
United States Senate
Washington, D.C. 20510

The Honorable Max Baucus
Committee on Finance
United States Senate
Washington, D.C. 20510

Dear Chairman Dole and Senator Baucus:

Senator Baucus has asked me to review Mr. John F. Scruggs's April 23, 1984, letter to Chairman Dole. In that letter, Mr. Scruggs, who is a nominee for Assistant Secretary for Legislation at the Department of Health and Human Services, responded to Senator Baucus's request for a clarification by Mr. Scruggs of his answer to one of eight written questions from Senator Baucus.

Senator Baucus's original question recounted an exchange between Ms. Teresa Hawkes, Acting Assistant Secretary for Legislation, and Chairman Dingell of the House Committee on Energy and Commerce, about committee access to documents containing trade secrets, patient-specific material or grand jury information. Senator Baucus asked whether Mr. Scruggs concurred that "such materials ... are not to be restricted from Congress but from the public?" Mr. Scruggs responded: "I believe that the provision of such documents to oversight and investigative bodies of the Congress should be accomplished expeditiously. However, such documents should only be provided consistent with the provisions of applicable law." When Mr. Scruggs was asked to clarify this response, he listed, in his reply of April 23, 1984, "[six] statutes [which] restrict the Department [of Health and Human Services's] ability to release certain categories of information and provide no exception from those restrictions in the case of requests from Congressional Committees." Mr. Scruggs stressed the importance of accommodation, indicating, "[f]or example, [that] certain categories of information, when given to a Committee, may be accompanied by a request to handle the material with special care."

1. Trade Secrets.

Two statutes on Mr. Scruggs's list protect trade secrets. One of them, 18 U.S.C. § 1905, is a general prohibition on the disclosure of trade secrets by officers or employees of the United States. The other, 21 U.S.C. § 331(j), is a specific prohibition on the disclosure of trade secrets acquired under the Federal Food, Drug, and Cosmetic Act. The application of these statutes to requests or subpoenas from congressional committees has been the subject of formal opinions by the Attorney General. Concerning these statutes, Mr. Scruggs is not writing on a clean slate.

a. 18 U.S.C. § 1905.

The key portion of 18 U.S.C. § 1905 (with emphasis added) is as follows:

> Whoever, being an officer or employee of the United States ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment ... which ... relates to the trade secrets ... of any person ... shall be fined ... or imprisoned ....

Attorney General Brownell's interpretation of 18 U.S.C. § 1905 is published in 41 Op. A.G. 221 (1955). The Chairman of the Federal Communications Commission had requested an opinion on the authority of the Commission to comply with a Senate committee request for earnings, profits, and expense information which had been received on a confidential basis from television stations and networks. [redacted] [redacted] authorized by law," as that term is used in section 1905, [redacted] legal authority for congressional subpoenas and [redacted]

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1/ The Attorney General also concluded that the Commission had the authority to decline to disclose the requested information, based on the "discretion in the executive branch to withhold confidential papers." Id. at 228. However, Mr. Scruggs is not asserting a claim of executive privilege. His point is grounded solely on the requirements of the statutes which he lists.

b. 21 U.S.C. § 331(j).

The statutory protection for trade secrets under the Federal Food, Drug, and Cosmetic Act does not contain an exception for disclosures "authorized by law." 21 U.S.C. § 331(j) provides:

> The following acts and the causing thereof are prohibited:
>
> (j) [R]evealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of [various provisions of the Federal Food, Drug, and Cosmetic Act] concerning any method or process which as a trade secret is entitled to protection.

This provision governs disclosure of trade secret information concerning, inter alia, emergency permit controls over the distribution of contaminated foods, id., § 344; food additives, id., § 348; infant formulas, id., § 350a; and new drugs, id., § 355.

The opinion of Attorney General Bell on the application of section 331(j) to congressional requests is published as 43 Op. A.G. No. 21 (1978). In it the Attorney General concluded that the Department of Health, Education and Welfare [redacted] f[redacted] i[redacted] Id. at 1. [redacted] (in particular, the exception for the courts) negates the implied existence of others.

2. Patient Privacy.

Three of the statutes listed by Mr. Scruggs expressly protect the identity of subjects of mental health research or protect records of the identity, diagnosis, prognosis, or treatment of drug or alcohol abuse patients in programs assisted by the federal government.

a. 42 U.S.C. § 242a(a).

The key language (with emphasis added) of this section is as follows:

> The Secretary [of Health and Human Services] may authorize persons engaged in research on mental health, including research on the use and effect of alcohol and other psychoactive drugs, to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify such individuals.

This provision -- which was originally applicable to "persons engaged in research on the use and effect of drugs" -- was added by § 3(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The House report, reprinted in 1970 U.S. Code Cong. & Ad. News 4566, 4594-95 stated:

> Section 3(a) of this title grants the Secretary of Health, Education, and Welfare a much needed authority to protect the privacy of drug research subjects by nondisclosure of identification data of such individuals. It enables the researcher, when authorized by the Secretary, to assure research subjects complete anonymity, with immunity from prosecution for withholding this identifying data. This authority is not limited to research conducted or supported by the Federal Government.

The specific statutory protection against the compelled identification "in any Federal ... legislative ... proceedings" of the subjects of "research on mental health, including research on the use and effect of alcohol and other psychoactive drugs" [redacted] ng
[redacted] ng
[redacted] ."

b. 42 U.S.C. § 290dd-3.[2/]

Subsection (a) provides:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Subsection (e) is a limited exception for sharing records within the Armed Services or within components of the Veterans' Administration which provide health care.

Patients may consent to disclosure of their records. Id., § 290dd-3(b)(1). Without consent, disclosure may be made in three circumstances. The first of these is inapplicable to congressional proceedings; it permits disclosures to medical personnel to the extent necessary to meet genuine medical emergencies. Id., § 290dd-3(b)(2)(A). The remaining two are applicable. One permits disclosure:

> To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

In the ordinary sense, "qualified personnel" probably refers to the job qualifications of private and executive branch personnel with research, audit, and evaluation responsibili-

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2/ This is the current codification of section 333 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, formerly codified at 42 U.S.C. § 4582.

ties. There is no express limitation, however, on the inclusiveness of "qualified personnel." A committee might ask the General Accounting Office to audit a program, or [redacted] might undertake a "program evaluation" of its own as part of an oversight inquiry or reauthorization review. If a committee obtains records for these purposes, it should adhere to the statutory obligation not to disclose patient identities.

The other applicable exception is 42 U.S.C. § 290dd-3(b)(2)(C), which permits disclosure:

> If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

The authority to obtain a judicial disclosure order should be as available to congressional committees as to others, although it is not readily apparent which courts would have jurisdiction to rule on applications for disclosure. Assuming that the proper court can be identified, the proceeding could be initiated by the executive to ascertain its authority to disclose information to the Congress. See In re Grand Jury Impanelled October 2, 1978 (79-2), 510 F. Supp. 112, 114 (D.D.C. 1981) (proceeding initiated by Department of Justice to determine whether Federal Rule of Criminal procedure 6(e) barred disclosure of documents to a Senate committee). It should be noted that the utilization of this provision might invite the courts to restrain the congressional publication of records, by "impos[ing] appropriate safeguards against unauthorized disclosure" pursuant to the second sentence of 42 U.S.C. § 290dd-3(b)(2)(C).

c. 42 U.S.C. § 290ee-3.[3/]

This section is similar to 42 U.S.C. § 290dd-3 except that it applies to records of the identity, diagnosis, prognosis, or treatment of patients in drug abuse prevention programs maintained or assisted by the United States. The exceptions to disclosure in section 290dd-3 and section 290ee-3 are the same.

3. Information Collection.

42 U.S.C. § 242m(d) section provides:

> No information, if an establishment or person supplying the information or described in it is identifiable, obtained in the course of activities undertaken or supported under section 242b, 242c, 242k, 242l, or 242n of this title may be used for any purpose other than the purpose for which it was supplied unless such establishment or person has consented (as determined under regulations of the Secretary) to its use for such other purpose; and (1) in the case of information obtained in the course of health statistical or epidemiological activities under section 242b or 242k of this title, such information may not be published or released in other form if the particular establishment or person supplying the information or described in it is identifiable unless such establishment or person has consented (as determined under regulations of the Secretary) to its publication or release in other form, and (2) in the case of information obtained in the course of health services research, evaluations, or demonstrations under section 242b or 242c of this title or in the course of health care technology activities under section 242n of this title, such information may not be published or released in other form if the person who supplied the information or who is described in it is identifiable unless such person has consented (as determined under

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3/ This is the current codification of section 408 of the Drug Abuse Prevention, Treatment and Rehabilitation Act, which was previously codified at 21 U.S.C. § 1175.

> regulations of the Secretary) to its publication or release in other form.

This provision only applies to information which identifies the establishment or person who had supplied it. Also, there is a question about the meaning of "published or released." In Ashland Oil, Inc. v. FTC, 548 F.2d 977 (D.C. Cir. 1976), Ashland sued to enjoin the FTC from transferring to a House committee information obtained from Ashland about reserve estimates for Ashland's natural gas leases and contracts on federal lands. The parties agreed that the information was a "trade secret" with competitive value to Ashland, and Ashland argued that experience showed that by providing this information to the Congress the information would be made public. 15 U.S.C. § 46(f) authorizes the FTC to make information public as it deems to be in the public interest except for "any trade secret ... which is privileged or confidential." The court held that Ashland had made no showing that Congress would necessarily make that information public; "absent such a showing [the statute] does not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request." Id. at 979 (footnote omitted). [redacted]

4. General Considerations.

The issues involved in the communications with Mr. Scruggs have been the subject of sharp exchanges in the past between committees of the Congress and executive officials. The most prominent of these was the subject of extensive House hearings. See Contempt Proceedings Against Secretary of Commerce, Roger C.B. Morton, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975) ("Contempt Proceedings"). The Secretary of Commerce with the support of Attorney General Levi had declined to provide to a House subcommittee documents relating to the Arab boycott. The Secretary and the Attorney General based their position on 50 U.S.C. App. § 2406(c) which, at the time, provided:

> No department, agency, or official exercising any function under th[e Export Administration] Act ... shall publish or disclose information obtained hereunder which is deemed confidential or with reference to

> which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

The subcommittee heard testimony that this section did not imply an exception for disclosure to the Congress. Professor Kurland of the University of Chicago told the subcommittee: "I find it difficult to accept the proposition that it should be presumed that Congress by its silence, intended to cut itself off from data appropriate and necessary to its oversight legislative functions...." Contempt Proceedings at 105. The subcommittee reported to its full committee a resolution to cite the Secretary for contempt, but the matter was settled before the full committee acted.

The Congress resolved the immediate dispute legislatively several years later in section 12 of the Export Administration Act of 1979. 50 U.S. App. § 2411(c)(2) now provides:

> Nothing in this Act shall be construed as authorizing the withholding of information from the Congress or from the General Accounting Office. All information obtained at any time under this Act ... shall be made available to any committee or subcommittee of Congress of appropriate jurisdiction upon request of the chairman or ranking minority member of such committee or subcommittee. No such committee or subcommittee, or member thereof, shall disclose any information obtained under this Act ... which is submitted on a confidential basis unless the full committee determines that the withholding of that information is contrary to the national interest. ****

This statute could serve as a model for assuring congressional access to sensitive executive branch information, while providing for congressional control over the release or publication of such information by congressional committees.

Sincerely,

Michael Davidson

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

APR 23 1981

The Honorable Robert Dole
Chairman
Committee on Finance
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to Senator Baucus' request that I clarify my response to question eight of those questions I was asked to respond to for the record.

A number of statutes restrict the Department's ability to release certain categories of information and provide no exception from those restrictions in the case of requests from Congressional Committees. Whether or not release of the information covered by those statutes would be permitted in any particular case would require a complete analysis of the circumstances surrounding the information and the Committees' request. Those statutes are:

Food, Drug and Cosmetic Act
section 301(j), 21 U.S.C. 331(j)

Public Health Service Act,
section 303(a), 42 U.S.C.
242a(a) -- Mental Health Research

Public Health Service Act,
section 308(d), 42 U.S.C.
242m(d) -- Health Research and
Statistical Activities

Comprehensive Alcohol Abuse and Alcoholism
Prevention, Treatment and Rehabilitation Act
of 1970, section 333, 42 U.S.C. 4582

Drug Abuse Prevention, Treatment and
Rehabilitation Act, section 408, 21 U.S.C.
1175

18 U.S.C. 1905 -- Trade Secrets

Although the provisions of these statutes are clear, my personal opinion is that the Department should make every effort to accommodate the requesting Committee whenever possible. For example, certain categories of information, when given to a Committee, may be accompanied by a request to handle the material with special care.

It would be impossible to categorize in advance all the types of information that the Department might request a Committee to handle with special care. Any information exempt from the disclosure requirements of the Freedom of Information Act may be sufficiently confidential to warrant a request by the Department that the information not be further disseminated by the Committee. Such information might include, but would not be limited to, information the disclosure of which would constitute an unwarranted invasion of personal privacy, trade secret information, attorney-client information, and inter- or intra-agency correspondence.

My personal view is that the oversight and investigative functions of Congressional Committees should be facilitated by this Department. A careful balance must be achieved, however, between those valid functions and the duties imposed on this Department by the law. I believe this balance can be achieved through a spirit of comity and reasonableness.

Thank you for this opportunity to clarify my response.

Sincerely,

John F. Scrugg

John F. Scrugg
Assistant Secretary-designate
for Legislation

cc: Senator Baucus

Senator ROTH. The committee is in recess.

[Whereupon, at 1:47 p.m., the hearing was concluded.]

[By direction of the chairman the following communications were made a part of the hearing record:]

DEPARTMENT OF HEALTH & HUMAN SERVICES — Office of the Secretary

Washington, D.C. 20201

MAY 22 1984

Honorable Robert Dole
Chairman
Committee on Finance
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to Senator Baucus' request that I explain the circumstances surrounding the recent exchange of correspondence between Chairman Dingell and the Secretary regarding the Chairman's request for certain documents.

As you know, Chairman Dingell posed ten questions in a rather lengthy letter to the Secretary dated April 25, 1984 and requested a reply no later than close of business May 16, 1984.

The proposal which is the object of Mr. Dingell's inquiry has been under consideration since 1950 and numerous offices, agencies and personnel have been involved since that time. The response to Mr. Dingell's inquiry required the effort and concurrence, not only of the Office of Legislation, but also the Office of the Assistant Secretary for Management and Budget, Planning and Evaluation, General Counsel, NIH and the Immediate Office of the Secretary. This process took a significant amount of time and the response to Mr. Dingell was one day late. In my current status as a consultant, I encouraged those involved to move the process along as expeditiously as possible.

Unfortunately, Chairman Dingell feels that his questions were not answered satisfactorily. In my opinion, when the letter was sent to the Chairman, the questions to which the Department could respond at that time were answered completely. Nevertheless, the name and phone number of the Deputy Assistant Secretary for Legislation (Health) was included in the response in order to clarify and expand on the answers as needed, and to be a contact for additional assistance.

Mr. Dingell's staff did in fact take the opportunity to call the day after receipt of our response, to request additional documents. The stack of documents, which is approximately twelve inches thick, will be sent to the Energy and Commerce Committee today. No mention was made at that time about the Department's original response being inadequate. Attached hereto is an additional letter to Chairman Dingell which provides further information and hopefully will be sufficient for his needs. If not, this office will continue efforts to assist the Chairman in his oversight and investigative responsibilities.

Senator Baucus also noted his concern about the willingness of individuals at the Department of Health and Human Services to cooperate with Committees of Congress. The Senator asks that I give certain personal assurances regarding requests for information.

In response to questions 1, 2, 7, and 8 of the original eight questions Senator Baucus asked me to respond to, I stated my view that employees should be encouraged to cooperate with Congress, that cooperation with Congress is essential, that the investigative and oversight responsibilities of Congress should be facilitated, and that the provision of documents should be accomplished expeditiously.

Senator Baucus asked me to clarify several of my responses to his original questions. In my letter of April 23, 1984, I state my personal opinion that the Department should make every effort to accommodate Congressional Committees. That letter cites several statutes, about which there is apparent disagreement even between staff lawyers on the House Energy and Commerce Committee and Senate Legal Counsel. I believe controversies can be overcome by carefully analyzing the specific circumstances of each case and may be disposed of by a simple request to handle certain documents with special care.

I appreciate the opportunity to state again that, under my stewardship, the Office of Legislation will seek to handle requests for information from Congressional Committees as expeditiously as possible and will seek to accommodate Congressional Committees whenever possible. On several occasions, I have sought to meet with Chairman Dingell and with Senator Baucus to personally convey my views regarding this issue.

As a concrete example of my intentions, I think it is important for you to know, Mr. Chairman, that I recently transmitted certain FDA documents to the Congress over the objections of the Department of Justice. Those documents went to Congressman Henry Waxman, also a Member of the Energy and Commerce Committee. I did so because the request was appropriate and because in my view the Department of Justice did not have a valid reason for withholding the documents. This is an incident which Chairman Dingell's staff has apparently found inconvenient to relay to you or Senator Baucus.

Thank you for this opportunity to clarify my position.

Sincerely,

John P. Scruggs
Assistant Secretary-Designate
for Legislation

NINETY-EIGHTH CONGRESS

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PHONE (202) 225-4441

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

May 1, 1984

Mr. M. B. Oglesby, Jr.
Assistant to the President
for Legislative Affairs
The White House
Washington, D. C. 20500

Dear Mr. Oglesby:

In response to your call yesterday to explore my concerns about the confirmation of Mr. Scruggs for the position of Assistant Secretary for Legislation, I thought I would provide you with both the history behind and legal authority for my position.

First, the concern: when the Oversight and Investigations Subcommittee was investigating the role of the Department of Health and Human Services (HHS) in addressing the infant mortality rates, I directed staff to review and obtain a variety of relevant documents. Acting Assistant Secretary for Legislation Teresa Hawkes wrote to me on March 1, 1984 indicating that there was some sort of screening process within HHS:

> "to determine that they [the files] contain no information (such as trade secrets, patient specific material or grand jury information) to which access would be restricted by law." (See letter of March 1 attached.)

On March 5, 1984, I wrote Secretary Heckler about a series of procedural issues involved in that investigation, including the restrictions cited by Ms. Hawkes. (See letter of March 5 attached.) During the hearing on infant mortality on March 16, 1984, I asked Dr. Brandt to clarify the position of the Department in terms of which classes of information, if any, are to be restricted from transfer to Congress when it is conducting an oversight inquiry. Dr. Brandt asked to provide an answer for the record and referred to his personal concern about patient

specific medical information. After the hearing I wrote to Dr. Brandt to ask him to complete the information which had been requested for the record. In response to my follow-up question about the position of the Department on providing or restricting information, he cited six statutes. (See question and answer from letters from Chairman Dingell to Dr. Brandt of April 5 and from Dr. Brandt to Chairman Dingell of April 17 attached.)

Presumably the content and legal authority for Dr. Brandt's answer was provided by the Office of Legislation and the Office of General Counsel as the very same language appeared in Mr. Scruggs' response to questions from Senator Baucus of the Senate Finance Committee. While I appreciate that the Congress drafted all of the cited statutes with the clear intention to restrict transfer of such information by administrators to the public, it is equally clear that the Congress had neither the intention nor the authority to abrogate its Constitutional authority to oversee the operations of the Executive Branch.

The Supreme Court has confirmed repeatedly the breadth of Congressional investigatory power. It has confirmed the long-standing principle that "[t]he scope of the [Congressional] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975), quoting Barenblatt v. United States, 360 U.S. 109, 111 (1960). That power extends "over the whole range of national interests concerning which Congress might legislate or decide upon due investigation not to legislate...." Barenblatt, 306 U.S. at 111. In Watkins v. United States, 354 U.S. 178, 187 (1957) the Court explained that Congressional investigatory "power is broad. It encompasses inquiries concerning the administration of existing laws, as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them."

Congress guards zealously this broad Constitutional power to investigate. The Department of Health and Human Services has cited no authority holding that when Congress adopts statutes intended to control release to the public of information by administrators, Congress intends to arm the administrators with

authority to shield themselves from Congressional oversight. We are aware of no such authority. Faced with precisely this question in a series of lawsuits over the Federal Trade Commission's (FTC) trade secrets statute, the courts refused to support the withholding of information from Congress. See FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 970 (D.C. Cir. 1980); Exxon Corp. v. FTC, 589 F.2d 582, 589 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979).

The chief statute cited to us in this regard, 18 U.S.C. § 1905, illustrates well the fact that Congress has never intended to curb its Constitutional powers of investigation by arming agencies with immunity from oversight. That statute prohibits disclosure of trade secrets and other confidential commercial information unless "authorized by law." Patently, the Constitutional power to investigate constitutes authority in law to obtain information. See, e.g., Eastland, supra. Thus, the courts in the FTC cases cited above declined to withhold information under 18 U.S.C. § 1905. Indeed, even the Attorney General has acknowledged that Congressional oversight is not to be blocked by citing the statute. 41 Op. Atty. Gen. 221 (1955).

That statute, and the other HHS confidentiality statutes mentioned by the Department, are like the Commerce Department's confidentiality statute under which information vital to oversight was, at first, withheld in 1975 from the House Commerce Committee investigation of nonenforcement of the laws concerning corporate compliance with the Arab boycott. Secretary of Commerce Morton went to the brink of contempt of Congress, and then yielded on complying with the oversight demands. See Contempt Proceedings Against Secretary of Commerce Rogers C.B. Morton: Hearings and Related Documents Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975).

As Assistant Secretary for Legislation, Mr. Scruggs would hold a key role in determining the nature of future cooperation between the Department and this Oversight and Investigations Subcommittee and all others. At present there is no ongoing dispute as to any specific documents requested by this Committee.

However, it seems to me that prior to taking the oath of office is the proper time for Mr. Scruggs to acknowledge that the Constitutional powers of the Congress to conduct and legislate oversight are not limited by any legislated restrictions.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

JDD:PFcm

Enclosures

cc: The Honorable Max Baucus
U. S. Senate

The Honorable Howard M. Metzenbaum
U. S. Senate

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of the Secretary

Washington, D.C. 20201

Attachment 1

MAR 1 1984

The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and Investigation
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20510

RECEIVED
MAR 1 1984
Subcommittee on
Oversight and Investigations

Dear Mr. Dingell:

This is in response to your letter of February 24 to Dr. Brandt requesting names of Department employees engaged in data collection of or policy regarding infant mortality. Attached is a list of relevant agency contacts.

Let me review Department policy on interviews and access to documents, which should facilitate the exchange of information.

With respect to the individuals whom your staff desires to interview, advance notice from you will be necessary so that schedules may be arranged in a mutually convenient manner and employees may be apprised of their responsibility to cooperate with your staff and of their individual rights. If your staff are going to be visiting an office at a particular time, advance notice of that visit will enable us to rearrange schedules accordingly in order to make available all of those individuals whom you desire to interview.

With respect to documents which you may wish to review and/or duplicate, please give us advance notice of the subject matter of your inquiry and the category of documents or files to which you would like to have access in order that we can arrange to have those files available and to determine that they contain no information (such as trade secrets, patient specific material or grand jury information) to which access would be restricted by law.

If we can be of further assistance, please let me know.

Sincerely,

Teresa Hawkes

Teresa Hawkes
Acting Assistant Secretary
for Legislation

Attachments

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

Attachment 2

March 5, 1984

The Honorable Margaret M. Heckler
Secretary
Department of Health and Human Services
200 Independence Avenue, S. W.
Washington, D. C. 20201

Dear Madame Secretary:

On March 1, 1984, the Subcommittee received a letter from Teresa Hawkes, Acting Assistant Secretary for Legislation, in response to my February 23 letter to Dr. Brandt about the Subcommittee's investigation of the disturbing black-white gap in infant mortality rates. In her letter, Ms. Hawkes set out a brief description of the Department of Health and Human Services' (HHS) policy on Subcommittee interviews with employees and access to documents. We have subsequently learned from HHS employees that on March 2 in a 10:00 a.m. meeting that a different and more detailed policy was outlined orally to employees.

As you will recall from your service as a Member of the House, oversight inquiries are of a particularly sensitive nature requiring the observance of procedures quite different from those followed in the routine legislative process. The ability to obtain information without the constraints of monitoring is essential to protect the rights of all parties. This inquiry process has been likened by the Supreme Court to a grand jury probe and the Congress has been described as the Grand Inquest of the Nation.

It has been consistent Subcommittee policy to give prior notice of employee interviews and to arrange times to be as mutually convenient as possible. The Subcommittee has extended similar courtesies in arranging to review and obtain documents. This does not mean, however, that HHS officials can screen interviewees or withhold documents.

In her letter, Ms. Hawkes alludes to files and a determination "that they contain no information ... to which access would be restricted by law." She cites three examples: (1) trade secrets; (2) patient specific material; and (3) grand jury information. The Subcommittee appreciates your Department's concern for protecting restricted materials and will accommodate those concerns consistent with the public interest. With respect to such materials, we would welcome your identifying them by category at the time they are made available. Of course, such screening should in no way delay their being made available.

If they are accurate, the reports from your Departmental employees of the instructions delivered to them by Ms. Bassell in the Office of Legislation are disturbing in several respects. First, despite requests by employees that such instructions be reduced to writing to clarify their responsibilities, the representatives of the Office of Legislation apparently responded that no written direction would be provided.

Second, the employee reports indicate the Office of Legislation outlined three options for employees in responding to Subcommittee interview requests: (1) to come alone; (2) to come with a person of his or her choice; or (3) not to come. As you are well aware, any Departmental sanction of the refusal of an employee to appear for an interview would clearly impede the ability of the Congress to carry out its investigatory responsibilities inherent in the U. S. Constitution. The Supreme Court has expressly recognized the danger to the effective conduct of government if the Legislature's power to investigate the Executive Branch is hampered. McGrain v. Daugherty 273 U.S. 135 (1927), Sinclair v. United States, 279 U.S. 263 (1929).

Subcommittee procedures require that interviews be conducted separately and privately by Subcommittee staff. Should any employee desire personal counsel who is not acting as Department counsel to be present for the purpose of providing advise regarding the interviewee's individual rights, such requests will continue to be honored. This is consistent with the procedures we worked out with your predecessor, Secretary Schweiker.

Apparently, on March 2 employees were instructed by the Office of Legislation to bring absolutely no documents with them to interviews and to package all requested documents for delivery to Ms. Bassell. Ms. Bassell would then forward them to the

Attachment 3

Question 7 excerpted from letter of Chmn. Dingell to Ass't Sec. Brandt, Apr.

Question 7: Please clarify the position of the Department of Health and Human Services as to:

(a) Which categories of information, when give to the committee, should be handled with special care; and

(b) Which classes of information, if any, are to be restricted from transfer to this Committee.

Please cite legal authorities supporting the position of the Department.

Answer excerpted from letter of Dr. Brandt to Chmn. Dingell, Apr. 17, 1984:

Answer:

(a) It would be impossible to categorize in advance all the types of information that the Department might request the Committee to handle with special care. Any information exempt from the disclosure requirements of the Freedom of Information Act may be sufficiently confidential to warrant a request by the Department that the information not be further disseminated by the Committee. Such information might include, but would not be limited to, information the disclosure of which would constitute an unwarranted invasion of personal privacy, trade secret information, attorney-client information, and inter-or intra-agency correspondence.

(b) A number of statutes restrict the Department's ability to release certain categories of information and provide no exception from those restrictions in the case of requests from Congressional Committees. Whether or not release of the information covered by those statutes would be permitted in any particular case would require a complete analysis of the circumstances surrounding the information and the Committee's request. Those statutes are:

Food, Drug, and Cosmetic Act, section 301(j), 21 U.S.C. 331(j)

Public Health Service Act, section 303(a), 42 U.S.C. 242a(a)--Mental Health Research

Public Health Service Act, section 308(d), 42 U.S.C. 242m(d)--Health Research and Statistical Activities

Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, section 333, 42 U.S.C. 4582

Drug Abuse Prevention, Treatment and Rehabilitation Act, section 408, 21 U.S.C. 1175

18 U.S.C. 1905--Trade Secrets

OMB Circular A-10 requires executive agencies to withold all budgetary information prior to transmittal to the Congress by the President of the budget to which it pertains. Under OMB Circular A-10, budgetary information includes, but is not limited to, agency budget submissions, requests, recommendations, supporting material and similar communications.

General Counsel prior to providing them to the Subcommittee. As you know, this would seriously interfere with the investigation. Subcommittee staff have been instructed to review materials, some of which are essential to the interviews. Employees are entitled to show Department materials to the Subcommittee, and when the Subcommittee requests them to do so it is their responsibility to comply.

Finally, any instruction that a full written report of the interview must be presented to the Office of Legislation constitutes an interference with a Congressional investigation and casts an unacceptable chill on the statutory protections of the communication between employees and the Congress (see 18 USC § 1505, 5 USC § 2301(a)(q) et seq. and 5 USC § 7211).

Your cooperation and that of your Department is appreciated.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

JDD:PFcm

ROBERT J. DOLE, KANS., CHAIRMAN

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MICHAEL STERN, MINORITY STAFF DIRECTOR

**United States Senate**

COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

May 18, 1984

The Honorable Robert Dole
Chairman
Committee on Finance
United States Senate
Washington, D.C. 20510

Dear ~~Mr. Chairman~~ Bob,

As you know, I am concerned about the willingness of individuals at the Department of Health and Human Services to cooperate with committees of Congress when they request documents and information from the Department. Recent problems between the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce in the House and the Department have been brought to my attention and I thought it appropriate to question Mr. John Soruggs, the designee for Assistant Secretary for Legislation about his willingness to cooperate with committees of Congress.

After reviewing the Senate Legal Counsel's explanation of the statutes that Mr. Soruggs cited as possibly restricting the release of information to the Congress, I remain concerned that Mr. Soruggs is misinterpreting at least some of those statutes cited and the Constitutional rights and responsibilities of the Congress. In addition, I received last evening the attached correspondence between Chairman Dingell and Secretary Heckler. After reviewing these letters, I believe it is important that Mr. Soruggs be asked to explain why all of Chairman Dingell's questions were not answered. Furthermore, I request that Mr. Soruggs be asked to give his personal assurances that similar problems will not occur during his tenure as Assitant Secretary for Legislation and that requests for information from committees of Congres will be handled as expeditiously as possible.

I appreciate your attention to this matter. Knowing of the importance of bringing Mr. Soruggs' nomination to a vote, I am hopeful that this matter can be resolved in the next few days.

With best personal regards, I am

Sincerely yours,

Enclosures

NINETY-EIGHTH CONGRESS

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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

April 25, 1984

The Honorable Margaret M. Heckler
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D. C. 20201

Dear Madame Secretary:

The Oversight and Investigations Subcommittee of the Committee on Energy and Commerce, under the authority of Rules X and XI of the Rules of the House of Representatives, has jurisdiction over biomedical research and the National Institutes of Health. The Warren G. Magnusen Clinical Center at the National Institutes of Health has long provided a unique opportunity to develop biomedical knowledge. There is neitner another facility in the United States nor any other hospital in the world of comparable size and sophistication dedicated to the support of research.

The Subcommittee is aware of the existence of a proposal to initiate the collection of third party payments for treatment provided by the Clinical Center. The Subcommittee has observed that the President's budget proposal for Fiscal Year 1985 is predicated on the receipt of "$7,500,000 in payments from, or on behalf of, patients at the Warren G. Magnusen Clinical Center ..." to be "generated by billing patients for those hospital services that would have been provided to them regardless of their participation in a research protocol." (See Justification of Appropriation Estimates for the Committee on Appropriations FY 85, Vol. II, p. 3.)

This same document notes that the Department is "examining the need for further legislation to implement this policy" and that "the budget contains a proposed modification to the appropriation language for the Office of the Director to permit the NIH to use the funds received from patients and third party payors".

The Subcommittee is also familiar with the Report of the Ad Hoc Committee on Third Party Payments of NIH which was completed in August of 1983. This report describes the special scientific mission of the Clinical Center and ways in which those research efforts could be

disrupted and future efforts undermined by this proposal. Even in the few areas where services are provided beyond those necessary exclusively for research (rather than treatment purposes) fewer patients would be available to participate in extremely valuable clinical trials.

For example, if there were no financial incentive associated with treatment at the Clinical Center, fewer candidates would elect to tolerate the longer hospital stays, the experimental procedures, and where necessary, the pain and inconvenience associated with the research design.

Second, the report reviews the legal barriers to collection of third-party payments from private insurers and public programs such as Medicare, Medicaid and CHAMPUS. The report sets out the restrictions under current law which are uniform through the insurance industry and which are contained in thousands of individual and group insurance contracts as follows:

- Payment is prohibited for experimental drugs, procedures or treatment methods.
- Payment is prohibited for services provided in a government facility. Medicare also excludes payment for services provided in a Federal facility unless the facility is a "community institution."
- Payment is prohibited for services for which the patient has no legal obligation to pay. This restriction prevents collecting insurance on behalf of a patient unless the patient has personal liability for the cost of the services charged. Even if the preceding restrictions did not apply, this provision would prevent billing the patient's insurance plan unless the patient was obligated to pay for all charges not covered by insurance.

The report goes on to conclude that:

> Because of these contract provisions in private insurance plans and statutory restrictions in Medicare and Medicaid, NIH could not expect to collect any reimbursement from public or private insurance plans until the restrictions were modified or removed.

> The same conclusion was reached by the President's Private Sector Survey on Cost Control (Task Force Report on Federal Hospital Management) which recommended that DOD hospitals establish programs to collect third-party reimbursement on behalf of DOD personnel but recognized that, because of contract restrictions as noted above, no significant revenue could be expected without Federal legislation mandating changes in insurance contract language.

Third, the report sets out two approaches to the current legal barriers to collection of any third-party payments. One approach, negotiation, would involve preparing policies and procedures to identify, to establish liability for, and to bill for therapeutic costs only (not for research procedures). Once the new policies were developed the NIH would commence negotiations with the myriad of insurers, which, in the absence of new legislation, could elect not to cover care at the Clinical Center now or in the future.

The availability of candidates to participate in valuable clinical trials could be seriously compromised by such unpredictable and burdensome negotiations.

The drafters of the report point to the enormous disincentive for insurers to lift restrictions related to Federal hospitals or to research-related expenses given the implicit threat that payment to Veteran's Administration and Department of Defense hospitals might be next. Even the President's Private Sector Survey on Cost Control recognized that no significant revenue could be expected (from or on behalf of DOD personnel) without Federal legislation mandating changes in insurance contract language.

The final section of the report details the considerable costs associated with gearing up an administrative and billing structure. The estimate for yearly operation of such a system is $1.5-1.8 million. The drafters further predict a delay of between two and five years before collections could cover these operating costs alone. Even after this start-up period, the revenue to the government would be reduced by the cost of operating the billing system. Similarly, governmental gain would be reduced by the amount of insurance coverage coming from public programs. This is estimated to be 50% of the total! The report concludes that under even the most favorable estimates the residual gain to the government would be no more than $3.4-3.7 million. It also could be as low as $1.6-1.9 million.

As a matter of national policy it is important that medical care given to patients who are participating in clinical trials be paid for like other medical care -- that is by insurers. When a patient agrees to participate in a scientifically-designed and NIH-funded trial, he has been assured by the researcher that the treatment he will receive is at least as effective as existing therapies. A policy of paying hospitals for medical care given in clinical trials will mean that more hospitals will participate and it will be possible to evaluate more new therapies and drugs.

However, in the case of the NIH Clinical Center where the facility is wholly dedicated to research, where this sole purpose could be irreparably impaired, where much of the expense of institution cannot be attributed to treatment of the participating patients, and where the federal savings promise to be minimal, many important questions must be addressed.

With particular concern for the potentially irreparable damage to ongoing research efforts and sabotage of future research capability, the Subcommittee is investigating the role of HHS in formulating and preparing to implement this proposal. To assist the Subcommittee in its investigation, please provide the following information:

1. The name of the office within the government in which this proposal was initiated (OMB, HHS, etc.).

2. The date on which HHS was first aware that such a proposal was to be developed.

3. The names of all offices and person(s) in HHS charged with responsibility for development of the proposal:

   (a) prior to the issuance of the Report of the Ad Hoc Committee on Third-Party Payments in August 1983; and

   (b) subsequent to the issuance of the report.

4. The names of persons in HHS who participated in the drafting of the Justification of Appropriation Estimates for the Committee on Appropriations as quoted above.

5. Please state the current intention of the Department as to whether or not to pursue this proposal for Fiscal Year 1985 or any subsequent year.

6. Please describe the current status of this proposal, including a summary of all steps which have been taken since the issuance of the Report in August 1983 to evaluate further or develop this proposal.

7. Please describe all steps anticipated from now until the beginning of Fiscal Year 1985 to evaluate further or develop this proposal.

8. Please describe in detail the way in which the potential impact on current and future research is being evaluated.

9. Please describe in detail the way in which the potential impact on current and future research is being compared to the potential revenue to be gained for the Federal government; that is, the design, process and outcome of any cost benefit analysis.

10. Please explain the rationale for budget savings of any amount in Fiscal Year 1985.

Should it become necessary for the Committee to investigate this matter further, I have asked Dr. Anthony Robbins, staff to the full Committee and Subcommittee counsel, Phyllis Freeman, to review all relevant documents and to conduct any interviews the Subcommittee requests. Should either call, please make all materials available for review and provide copies if they are requested. Similarly, please facilitate the arrangement of interviews with HHS staff should that be asked.

Please deliver your response to this letter to the Subcommittee offices in room 2323 Rayburn House Office Building no later than the close of business Wednesday, May 16, 1984.

Thank you for your cooperation in this matter.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

JDD:PFdb

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

RECEIVED
MAY 17 1984
Subcommittee on
Oversight and Investigations

Dear Mr. Chairman:

Before addressing the specific concerns of your April 25, 1984 letter regarding the Department's proposal to seek third party reimbursements for non-research related services at the National Institutes of Health Clinical Center, it is important to understand the legal and policy context under which this proposal was developed. One of the major budget themes of this Administration has been to further implement, where appropriate, the longstanding User Charge Statute. This statute (31 U.S.C. 9701) provides that individuals who derive specific service benefits from government operations should be charged for the costs of providing those benefits. While it is often necessary and/or desirable for certain activities to be conducted by the Federal Government, it is inequitable for the general taxpayer to bear the burden of special services for specific users.

In addition to the issue of equity, the application of user fees is a valuable tool in reducing the Federal budget deficit, although the Clinical Center proposal is rather minimal in this respect. In certain cases, including the proposal relating to the Clinical Center, the introduction of user fees for specific services is a mechanism to enhance the availability of operating funds while, at the same time, not increasing the requisite budget authority.

Because the Administration has been so forthright for several months in presenting this proposal, including specifically highlighting it in the Department's press release on our FY 1985 budget request, in the tabular materials presented in FY 1985 Budget Appendix, in the Congressional Justifications for NIH and in our FY 1985 appropriations hearings testimony, I am disturbed by the harsh tone of your letter. This is a reasonable proposal which we have asked the Congress to consider and which we believe has been approached in a direct and open manner. The National Institutes of Health is one of the most successful and productive enterprises supported by the Federal government. As steward of the Department responsible for carrying out the mandate for NIH, I assure you that I would never support a policy which could cause "irreparable damage" to NIH research programs and "sabotage" our future research capabilities.

Specifically, regarding the development of this user fee proposal, this concept has been considered many times over the thirty-year history of the facility. Various examinations have provided us, we feel, with an adequate evaluation of this concept. The genesis of this specific proposal was in the fall of 1982 during deliberations on the President's FY 1984 budget. Initially, broad agreement was reached at that time among the Department, the Office of Management and Budget (OMB), and White House staff to explore this issue over the following year for possible inclusion in the FY 1985 budget. This agreement was later confirmed in OMB's formal FY 1984 budget allowance letter of February 23, 1983 to the Department.

Examination of this issue continued throughout 1983. After careful thought and review of various analyses of the issue, not only the August, 1983 report to which your letter refers, a specific proposal for charging certain patients at the Clinical Center for non-research related services was formulated. The proposal was included in the FY 1985 Public Health Service (PHS) budget submission to the Department for NIH and remained in the request through subsequent levels of review, finally becoming part of the President's FY 1985 budget request to Congress.

The Department is cognizant of several issues regarding the Clinical Center user fee proposal which could be clarified by various legislative approaches. While we are continuing to explore these issues, we remain committed to extending the user fee concept to non-research related services at the Clinical Center precisely because, as stated earlier, implementing such a system would be equitable for the taxpayer and reasonable and responsible as a way to provide the Clinical Center with greater resources. As with any new policy, we will monitor it to assure that it is not affecting negatively the essential mission of the Clinical Center. We believe it is an appropriate policy objective and it is likely that it would be pursued in subsequent budget requests should Congress limit our ability to implement such a fee structure in FY 1985.

As you know, in FY 1985 we have estimated a residual gain of $7.5 million from reimbursements for the Clinical Center. While this is not a precise calculation, we feel it is a reasonable estimate of revenues based on prior examination of this issue. This estimate is not inconsistent with the receipts realized in NIH-sponsored General Clinical Research Centers (GCRC's). In the GCRC program, where there is a longstanding policy of capturing reimbursements for non-research related services, approximately $15 million was received in FY 1983 by these grantees as third-party reimbursements. In 1983 the GCRC program supported approximately 600 research beds. Analogously, it is reasonable to expect that the Clinical Center, with an occupancy rate of about one-half the total number of GCRC beds and given application of the same criteria for third-party reimbursements, should be able to collect approximately one-half of what the GCRC's receive.

In addition, the 1978 General Accounting Office report, "Service for Patients Involved in NIH-Supported Research: How Should They Be Classified and Who Should Pay For Them?" while not clearly recommending charging Clinical Center patients, included the statement that "Clinical Center patients receive a wide variety of nonresearch services estimated by NIH officials to cost in excess of $9 million." Furthermore, a draft Public Health Service study conducted in the spring of 1981 on possible reimbursements from Clincal Center patients stated, "An initial rough estimate is that between $6 and $9 million in net revenues could be raised."

I trust this response is both helpful and informative. Members of my staff are available for further consultation should you so desire. Should Subcommittee staff wish to examine further any documentation in the Department concerning this proposal, we would welcome their review. I ask that all contacts be arranged through Cynthia C. Root, Deputy Assistant Secretary for Legislation (Health), on 245-7450.

Sincerely,

Margaret M. Heckler

Margaret M. Heckler
Secretary

NINETY-EIGHTH CONGRESS

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U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

May 17, 1984

The Honorable Margaret M. Heckler
Secretary
Department of Health and Human Services
200 Independence Avenue, S. W.
Washington, D. C. 20201

Dear Madame Secretary:

Reference is made to your undated letter to me in response to my letter of April 25, 1984 about the proposal on third party payments at the Warren G. Magnusen Clinical Center at the National Institutes of Health.

My letter posed ten specific questions. You have failed to provide any response whatsoever to questions 3(a) and (b), 4, 8, and 9. Please provide the answers immediately.

Sincerely,

John D. Dingell
Chairman
Subcommittee on
Oversight and Investigations

cc: The Honorable Robert Dole
The Honorable Max Baucus
The Honorable Howard M. Metzenbaum

JDD:PFdb